Supreme Court, U.S.
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No. 00-

IN THE

Supreme Court of the United States

STOLT OFFSHORE INC. and
STOLT COMEX SEAWAY HOLDINGS INC.,

Petitioners,

v.

SCIENCE APPLICATIONS
INTERNATIONAL CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Whether the ruling and Mandate of the United States Court of Appeals for the Fifth Circuit, holding State law claims which pertain to work performed on the Outer Continental Shelf, while governed by the Outer Continental Shelf Lands Act and which become Federal law by application of the Outer Continental Shelf Lands Act surrogate law mandate, are deemed to not "arise under" the laws of the United States to sustain a federal question subject matter jurisdiction removal action, and which conflict with controlling jurisprudence of this Honorable Court and a prior decision of the United States Court of Appeals for the Fifth Circuit, present compelling reasons for review by Writ of Certiorari.

Whether the ruling and Mandate of the United States Court of Appeals for the Fifth Circuit, which permit remand to State Court of a civil action properly removed under original federal question subject matter jurisdiction predicated solely on concurrent State and Federal Court jurisdiction, thereby standing in conflict with a decision of the United States Court of Appeals for the Eighth Circuit, and which issue is *res nova* with this Honorable Court, present compelling reasons for review by Writ of Certiorari.

STATEMENT PURSUANT TO RULE 29.6

Petitioner Stolt Offshore Inc., formerly known as Stolt Comex Seaway Inc., is wholly owned by Stolt Comex Seaway Holdings Inc. Petitioner Stolt Comex Seaway Holdings Inc. is wholly owned by Stolt Comex Seaway B.V., a Netherlands corporation.

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Petitioners respectfully Petition for a Writ of Certiorari to review the ruling and Mandate of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The Mandate denying the Petition for Writ of Mandamus and the Order denying Reconsideration and Rehearing En Banc of the United States Court of Appeals for the Fifth Circuit, Civil Action No. 00-20582, are not reported.[1]

The Remand Order of the United States District Court for the Southern District of Texas in *Science Applications International Corporation v. Stolt Comex Seaway Holdings Inc., Stolt Comex Seaway Inc., and Stolt Offshore Inc.*, Civil Action No. 00-1271, is not reported.[2]

STATEMENT OF THE BASIS FOR JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered July 19, 2000. The United States Court of Appeals for the Fifth Circuit denied rehearing and rehearing en banc in an Order dated August 18, 2000. No motions for extension of time have been filed.

This Petition is filed within ninety days of the United States Court of Appeals for the Fifth Circuit's denial of rehearing and therefore, this Honorable Court has jurisdiction of this Petition by virtue of 28 U.S.C. § 1254(1). Jurisdiction in the Courts below was premised on removal jurisdiction, 28 U.S.C. § 1441(b), the Outer Continental

1. See Appendices A and C at 1a and 20a, respectively.

2. See Appendix B at 3a.

Shelf Lands Act, 43 U.S.C. § 1349(b)(1)(A), and Federal Appellate Jurisdiction of the District Courts of the United States, Federal Rule of Appellate Procedure 21(a) and 28 U.S.C. § 1651(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent constitutional provision involved in this case is United States Constitution, Art. III, § 2, cl. 1.[3]

The pertinent statutes involved in this case are: 28 U.S.C. § 1441(b); 28 U.S.C. § 1447(c) and (d); 43 U.S.C. § 1333(a)(2)(A); and 43 U.S.C. § 1349(b)(1)(A).[4]

STATEMENT OF THE CASE

On March 17, 2000, Science Applications International Corporation ("SAIC") filed suit against Stolt Comex Seaway Holdings Inc., Stolt Comex Seaway Inc. and Stolt Offshore Inc. ("SOI") in the 164th Judicial District Court, Harris County, Texas, regarding a contractual dispute pertaining to the lay and burial of fiber optic cable, known as "FiberWeb", on the Outer Continental Shelf in the Gulf of Mexico off the coast of Texas.[5] The fiber optic cable is the integral transmission component of a communications system constructed as a data and/or communications link between oil and gas producing platforms located offshore on the Outer

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3. See Appendix D at 22a.

4. See Appendices E through H at 23a through 26a, respectively.

5. See Lodging Appendix (Tab 1) at L-1 through L-9.

Continental Shelf, to and from shoreside facilities for the purpose and/or in furtherance of development and/or production of minerals from the subsoil and seabed of the Outer Continental Shelf.[6]

A Notice of Removal was timely filed on April 14, 2000 by SOI based on original subject matter jurisdiction under the Outer Continental Shelf Lands Act ("OCSLA").[7] SAIC filed a Motion to Remand on May 10, 2000,[8] which was opposed by SOI.[9] The District Court entered a Memorandum and Order of Remand on June 8, 2000.[10] A Petition for Writ of Mandamus was filed by SOI on July 6, 2000.[11]

By panel comprised of the Honorable Judges Wiener, Garza and Parker, the United States Court of Appeals for the Fifth Circuit, by Mandate of July 19, 2000, denied the Petition for Writ of Mandamus.[12] The United States Court of Appeals for the Fifth Circuit recognized and held that original jurisdiction over the dispute exists pursuant to the OCSLA, but did not find that the matter "arises under" Federal law. The Panel agreed with the District Court that

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6. See Lodging Appendix (Tab 2) at L-10 through L-13.

7. See Lodging Appendix (Tab 3) at L-14 through L-21.

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10. See Appendix B at 3a.

11. See Lodging Appendix (Tab 6) at L-50 through L-69.

12. See Appendix A at 1a.

the State and Federal Courts have concurrent jurisdiction over claims under OCSLA, complete preemption does not exist, and therefore, remand by the District Court was proper. On August 2, 2000, Petitioners timely filed Petitions for Reconsideration and/or Rehearing En Banc.[13]

On August 18, 2000, the United States Court of Appeals for the Fifth Circuit denied Petitioners' Petitions for Reconsideration and/or Rehearing En Banc, citing Federal Rule of Appellate Procedure 35 and United States Court of Appeals for the Fifth Circuit Rule 35.[14]

SUMMARY OF THE ARGUMENT

The Outer Continental Shelf Lands Act ("OCSLA") pertains, in part, to cases and controversies arising out of, or in connection with, operations on the Outer Continental Shelf involving the exploration, development, or production of the minerals of the subsoil or seabed of the Outer Continental Shelf. Congress intended the subsoil of the Outer Continental Shelf to appertain to the United States and be subject to its jurisdiction, power and control. The law governing disputes arising on the Outer Continental Shelf states:

> . . . To the extent that they are applicable and not inconsistent with this act or with other Federal laws and regulations of the Secretary now in effect or hereafter adopted, *the civil* and criminal *laws of each adjacent state* now in effect are

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13. See Lodging Appendix (Tab 7) at L-70 through L-86.

14. See Appendix C at 20a.

> hereafter adopted, amended, or repealed *are hereby declared to be the law of the United States* for that portion of the subsoil and seabed of the outer Continental Shelf, . . .

43 U.S.C. § 1333(a)(2)(A) (emphasis added).[15]

The United States Supreme Court held the purpose of the OCSLA was to define a body of law applicable to the seabed, subsoil and the fixed structures on the Outer Continental Shelf, which law was to be Federal law of the United States, applying consistent State law *only* as Federal law. *Rodrigue v. Aetna Cas. & Sur. Co.*, 395 U.S. 352, 89 S. Ct. 1835, 23 L. Ed. 2d 360 (1969) (emphasis added). The United States Court of Appeals for the Fifth Circuit, in *Hufnagel v. Omega Service Indus., Inc.*, 182 F.3d 340 (5th Cir. 1999), held that the subject personal injury claim which arose on the Outer Continental Shelf, emanated from Louisiana State law which became Federal law by application of OCSLA's surrogate law mandate, and was determined to be one "arising under" the OCSLA for purposes of removal. *Hufnagel, supra.*

The ruling and Mandate issued in these proceedings by the United States Court of Appeals for the Fifth Circuit conflict with controlling jurisprudence in erroneously holding that State law-based claims, which emanate from disputes pertaining to operations on the Outer Continental Shelf, governed by the OCSLA, do not arise under Federal law for purposes of original subject matter jurisdiction and removal.

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15. See Appendix G at 25a.

The ruling of the United States Court of Appeals for the Fifth Circuit thereby sanctions remand to State Court of a civil action properly removed under original federal question subject matter jurisdiction predicated solely on concurrent State and Federal Court jurisdiction. Such ruling is in conflict with a decision of the United States Court of Appeals for the Eighth Circuit, *Williams v. Ragnone*, 147 F.3d 700 (8th Cir. 1998). This issue is *res nova* with this Honorable Court, and presents an important question of Federal law which should be settled by this Honorable Court.

Civil actions properly made the subject of removal, by definition, present with a concurrent jurisdiction threshold. To hold, as here by the United States Court of Appeals for the Fifth Circuit, that concurrent jurisdiction is a correct and sufficient basis for remand, raises the specter that all matters so presenting, if removed, should be remanded. Federal question subject matter jurisdiction dictates a contrary end result, as such grants to litigants access to Federal Court via removal pursuant to 28 U.S.C. § 1441(b). To hold otherwise, effectively negates that statutorily granted remedy.

At issue herein, are contractual disputes between the parties concerning the deployment, lay and burial of fiber optic cable on the Outer Continental Shelf for the specific purpose of providing communication and data links between a number of offshore platforms and shoreside facilities as respects, and solely as respects, operations conducted on the Outer Continental Shelf pertaining to the development and production of minerals from the subsoil and seabed of the Outer Continental Shelf. Pursuant to the OCSLA, the law to be applied, expressly declared to be Federal law, is that of the adjacent State.

Had Congress intended the law of the State adjacent to the particular Outer Continental Shelf situs to extend as State law onto the Shelf, it would have so stated. Congress intended Federal law (even if borrowed via surrogate status from the adjacent State) to apply to the OCSLA. Hence, in those matters governed by the OCSLA, Federal law controls and those matters must be so analyzed, including, when existent, matters pertaining to removal jurisdiction. There is no line of demarcation put forth in the OCSLA to differentiate application of law. Rather, once situs on the Shelf is determined, State law *is* Federal law for all purposes of resolving the matters at issue from their inception.

That original subject matter jurisdiction exists in the Federal Court by virtue of the Outer Continental Shelf Lands Act is established and was so held by the United States Court of Appeals for the Fifth Circuit. The District Court did not remand for lack of subject matter jurisdiction or defect in the removal procedure. Also clearly established, is the absence of other permissible basis for remand. Therefore, Petitioner's statutory right to proceed in Federal Court has erroneously been denied.

Petitioners' Writ of Certiorari should be granted for these compelling reasons, and the ruling and Mandate of the United States Court of Appeals for the Fifth Circuit, upon review, should be affirmed, in part, as to the existence of original subject matter jurisdiction under the OCSLA, and reversed, in part, with instructions to vacate the District Court's Remand Order and to remand for consistent proceedings.

REASONS FOR GRANTING THE WRIT

I. WHETHER THE RULING AND MANDATE OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, HOLDING STATE LAW CLAIMS WHICH PERTAIN TO WORK PERFORMED ON THE OUTER CONTINENTAL SHELF, WHILE GOVERNED BY THE OUTER CONTINENTAL SHELF LANDS ACT AND WHICH BECOME FEDERAL LAW BY APPLICATION OF THE OUTER CONTINENTAL SHELF LANDS ACT SURROGATE LAW MANDATE, ARE DEEMED TO NOT "ARISE UNDER" THE LAWS OF THE UNITED STATES TO SUSTAIN A FEDERAL QUESTION SUBJECT MATTER JURISDICTION REMOVAL ACTION, AND WHICH CONFLICT WITH CONTROLLING JURISPRUDENCE OF THIS HONORABLE COURT AND A PRIOR DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, PRESENT COMPELLING REASONS FOR REVIEW BY WRIT OF CERTIORARI.

The ruling of the United States Supreme Court for the Fifth Circuit, in determining an inability to view this dispute as one "arising under" Federal law, conflicts with the opinion of this Honorable Court in *Rodrigue v. Aetna Cas. & Sur. Co.*, 395 U.S. 352, 89 S. Ct. 1835, 23 L. Ed. 2d 360 (1969), and further, with its own prior ruling, *Hufnagel v. Omega Service Indus., Inc.*, 182 F.3d 340 (5th Cir. 1999). Specifically, original subject matter jurisdiction exists in Federal court by required application of the Outer Continental Shelf Lands Act ("OCSLA").

Pursuant to the surrogate Federal law mandate of the OCSLA, the law of the adjacent State becomes Federal law to address and resolve all issues in the litigation. Federal law controls and such claims therefore "arise under" Federal law for removal jurisdiction purposes.

The subject Remand Order was not properly issued. Permissible grounds for remand are lack of subject matter jurisdiction, defect in removal procedure, contractual arrangement between the parties, applicable statute warranting remand, or circumstances giving rise to discretionary dismissal. Close examination of the Remand Order clearly reveals significant internal inconsistencies and further, no permissible ground for remand. The District Court writes, on page 16 of the Remand Order, the causes of action asserted herein " . . . do not fall within the ambit of OCSLA . . ." and further explains, " . . .because the dispute does not deal with or affect *except in a most tangential way* the operations involving the exploration, development, or production of natural resources of the OCS".[16] The District Court then concludes:

> Ultimately, once FiberWeb is in and operating, matters relating to the actual communications regarding production of minerals on the OCS *may be* within the jurisdictional grant of OCSLA.[17]

The Supreme Court precedent regarding the reviewability of Remand Orders is clear and provides that Remand Orders issued pursuant to 28 U.S.C. § 1441(c), based on lack of subject matter jurisdiction or defect in removal

16. See Appendix B at 3a.

17. See Appendix B at 3a (emphasis added)

procedure, are not reviewable due to the bar of 28 U.S.C. § 1447(d). *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 116 S. Ct. 1712, 135 L. Ed. 2d 1 (1996); *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336, 96 S. Ct. 584, 46 L. Ed. 2d 542 (1976) (disavowed in *Quackenbush* regarding exclusivity of review by mandamus). Therefore, Remand Orders based other than under 28 U.S.C. § 1447(c) are reviewable, either by appeal, under the collateral order doctrine, or by mandamus. *Id.*

The United States Court of Appeals for the Fifth Circuit's ruling and Mandate correctly recognized the existence of original subject matter jurisdiction under the OCSLA with respect to the contract dispute at issue. However, the Court commented, " . . . we fail to see how this contract dispute 'arises under' federal law". The Court's holding implicitly found that concurrent jurisdiction between the State and Federal Courts to be a sound basis for remand, effectively denying the Petition for Writ of Mandamus and refusing to vacate the District Court's decision to remand.

SOI submits the Court's findings and inconsistent holding in failing to determine that the dispute "arises under" Federal law and ruling that concurrent jurisdiction between State and Federal Courts may be the sole ground for remand, are erroneous.

The OCSLA is clear in providing for adoption of the law of the adjacent State as a gap filler where there exists no applicable Federal law:

> . . . To the extent that they are applicable and not inconsistent with this act or with other Federal

> laws and regulations of the Secretary now in effect or hereafter adopted, *the civil* and criminal *laws of each adjacent state* now in effect are hereafter adopted, amended, or repealed *are hereby declared to be the law of the United States* for that portion of the subsoil and seabed of the outer Continental Shelf, . . .

43 U.S.C. § 1333(a)(2)(A) (emphasis added).[18] The adopted state law thereby becomes surrogate Federal law. *E.g.*, *Tennessee Gas Pipeline Co. v. Houston Cas. Ins. Co.*, 87 F.3d 150, 153-54 (5th Cir. 1996), *reh'g denied*, 95 F.3d 1151 (5th Cir. 1996). OCSLA's mandated application of adjacent State law requires the State law become surrogate Federal law. Applied to these facts, SAIC's State law claims are transformed into Federal claims and thereby "arise under" Federal law. *See Rodrigue*, *supra*; *Hufnagel*, *supra*; *Tennessee Gas Pipeline Co.*, *supra*; *Amoco Production Co. v. Sea Robin Pipeline Co.*, 844 F.2d 1202 (5th Cir. 1988); *Dennis v. Bud's Boat Rental, Inc.*, 987 F. Supp. 948 (E.D. La. 1997); *Joyner v. Ensco Offshore Oil Co.*, 2000 WL 341029 (E.D. La. 2000); *Stokes v. Petroleum Helicopters*, 1997 WL 695557 (E.D. La. 1997); *Bondi v. Atlantic-Richfield Co.*, 1994 WL 66753 (E.D. La. 1994).

Thus, removal was proper under 28 U.S.C. § 1441(b), which provides:

> . . . Any civil action of which the district courts have original jurisdiction founded on a claim or *arising under* the Constitution, treaties or laws

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18. See Appendix G at 25a.

> of the United States shall be removable without regard to the citizenship or residence of the parties . . .

28 U.S.C. § 1441(b) (emphasis added).[19]

The United States Court of Appeals for the Fifth Circuit's pronouncement in failing to recognize how this matter "arises under" Federal law for purposes of removal jurisdiction should not serve as the reason to deprive SOI of its statutory right to adjudicate this matter in a federal forum. *E.g.*, *Huber v. Greyhound Lines, Inc.*, 926 F. Supp. 821 (E.D. Wis. 1996); *Smith v. Anadrill, Inc.*, 762 F. Supp. 1267 (S.D. Tex. 1991); *Mercy Hospital Ass'n v. Miccio*, 604 F. Supp. 1177 (E.D.N.Y. 1985).

The United States Court of Appeals for the Fifth Circuit, in *Hufnagel*, *supra*, held that a State law claim made applicable Federal law by OCSLA, is one "arising under" OCSLA within the meaning of 28 U.S.C. § 1441(b) and 43 U.S.C. § 1333, and is thus removable to Federal Court. This ruling is consistent with this Honorable Court's holding in *Rodrigue*, *supra*, the United States Court of Appeals for the Fifth Circuit's prior dictates of *Tennessee Gas Pipeline Co.*, *supra*, and the general policy of uniformity concerning litigation of disputes arising on the Outer Continental Shelf by the Federal Courts, particularly since Congress has intended to treat the Shelf as a "federal enclave". *Rodrigue*, 395 U.S. at 354. In *Rodrigue*, the Supreme Court held that the purpose of OCSLA was " . . . to define a body of law applicable to the seabed, the subsoil, and the fixed structures such as those in

19. See Appendix E at 23a.

question here on the Outer Continental Shelf." *Id.* In *Tennessee Gas Pipeline Co., supra,* the United States Court of Appeals for the Fifth Circuit addressed whether OCSLA claims arise under Federal law for removal purposes. The Court stated, "given the national interest that prompted Congress to pass OCSLA and grant broad jurisdiction under 43 U.S.C. § 1349, Congress arguably intended to vest the Federal Courts with the power to hear any case involving the OCS, even on removal, without regard to citizenship." *Tennessee Gas Pipeline Co.*, 87 F.3d at 156.

The United States Court of Appeals for the Fifth Circuit Panel, by Mandate in these proceedings, correctly concluded that original jurisdiction does, in fact, exist " . . . as a result of the subject matter of the contract in issue being a support activity of the petroleum platforms and aiding in the production of minerals of the Outer Continental Shelf, . . .".[20]

Section 1333(a)(2) of the OCSLA provides that laws of the adjacent State, when not inconsistent with OCSLA or with other Federal laws and regulations are declared to be Federal law. 43 U.S.C. § 1333(a)(2)(A).[21] In this matter, the laws of the State of Texas, as the State adjacent to the Outer Continental Shelf-based operations at issue, became surrogate Federal law for purposes of resolving this contractual dispute. SOI submits the absence of sound reasoning to differentiate the legal analysis between laws which are derived directly from a Federal statute and those which derive from the law of the adjacent State and become Federal by virtue of the surrogate law mandate of OCSLA.

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20. See Appendix A at 2a.

21. See Appendix G at 25a.

See, e.g., Tennessee Gas Pipeline Co., supra; Amoco Production Co., supra; Joyner, supra; Stokes, supra; Bondi, supra.

The *Hufnagel* Court made no such distinction, applying the Louisiana Civil Code as surrogate Federal law to a personal injury claim arising on the Outer Continental Shelf. *Hufnagel, supra.* The Civil Code Article claim was determined to be one "arising under" the OCSLA for purposes of removal under § 1441(b) and § 1333. SOI submits the absence of a valid or rational distinction between the Louisiana Civil Code Article claims in *Hufnagel* and those Texas-based contract claims herein with respect to whether they "arise under" Federal law (OCSLA) for purposes of subject matter jurisdiction.

All elements of SAIC's stated cause of action arise under the OCSLA, since the contractual dispute at issue directly pertain to matters related to the production of minerals on the Outer Continental Shelf. SAIC's claims specifically pertain to activities conducted and/or which occurred on the Outer Continental Shelf; hence, the OCSLA controls. Preemption is not nor does it become an issue. The District Court erroneously noted removal was premised on grounds that the OCSLA preempted the case. Rather, the case was removed pursuant to the specific jurisdictional grant contained within the OCSLA, as arising under Federal law.

The District Court cited the "well-pleaded complaint rule" in noting the propriety of removal depends upon whether the case falls within the original federal question jurisdiction under "38 (sic) U.S.C. § 1331".[22] It is well-settled

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22. See Appendix B at 5a.

that a cause of action "arises under" Federal law only when the "well-pleaded" complaint of plaintiff raises issues of Federal law. *Gully v. First Nat'l Bank*, 299 U.S. 109, 57 S. Ct. 96, 81 L. Ed. 70 (1936). The jurisprudentially recognized corollary is "complete preemption", which holds, " . . . Congress may so completely preempt a particular area that any civil complaint raising this select group of claims is necessarily federal in character."[23] *Heimann v. National Elevator Indus. Pension Fund*, 187 F.3d 493, 499 (5th Cir. 1999), *citing and quoting*, *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 63, 107 S. Ct. 1542, 95 L. Ed. 2d 55 (1987).

SOI submits the "well-pleaded complaint rule" and the issue of "complete preemption" are never reached as the OCSLA contains its own specific jurisdictional grant, 43 U.S.C. § 1349(b)(1)(A).[24] In *Amoco Production Co.*, *supra*, the United States Court of Appeals for the Fifth Circuit addressed whether an action involving the "take-or-pay" obligations in contracts for the sale or purchase of natural gas involved a dispute within the District Court's jurisdiction under the Outer Continental Shelf Lands Act. In ultimately deciding that the contracts involved "production", and therefore were within OCSLA jurisdiction, the Court, with regard to the "well-pleaded complaint rule", stated:

> In determining federal court jurisdiction, *we need not traverse the Serbonian Bog of the well*

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23. "Complete preemption" is sometimes confused with "ordinary preemption", the latter of which does not implicate federal question subject matter jurisdiction. *Heimann*, 187 F.3d at 499.

24. See Appendix H at 26a.

> *pleaded complaint rule* . . . because . . . OCSLA expressly invests jurisdiction in the United States District Courts.

Amoco Production Co., 844 F.2d at 1205 (internal citations omitted and emphasis added).[25] The existence of OCSLA-grounded original subject matter jurisdiction, as correctly found by the United States Court of Appeals for the Fifth Circuit in its Mandate, dictates that neither the "well pleaded complaint rule" nor its corollary of "complete preemption" are at issue.

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25. *See also, LaRousse v. Murphy Exploration & Prod. Co.*, 1998 WL 283304 (E.D. La. 1998); *Martin v. Pride Offshore Co., Inc.*, 1998 WL 24423 (E.D. La. 1998); and *Fields v. Pool Offshore, Inc.*, 1997 WL 767634 (E.D. La. 1997), *reh'g denied*, 1998 WL 43217 (E.D. La. 1998), *aff'd*, 182 F.3d 353 (5th Cir. 1999), *cert. denied*, __ U.S. __, 120 S. Ct. 1161, 145 L. Ed. 2d 1073 (2000).

II. WHETHER THE RULING AND MANDATE OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, WHICH PERMIT REMAND TO STATE COURT OF A CIVIL ACTION PROPERLY REMOVED UNDER ORIGINAL FEDERAL QUESTION SUBJECT MATTER JURISDICTION PREDICATED SOLELY ON CONCURRENT STATE AND FEDERAL COURT JURISDICTION, THEREBY STANDING IN CONFLICT WITH A DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT, AND WHICH ISSUE IS *RES NOVA* WITH THIS HONORABLE COURT, PRESENT COMPELLING REASONS FOR REVIEW BY WRIT OF CERTIORARI.

The United States Court of Appeals for the Fifth Circuit's refusal to find District Court error in remanding the case based upon the existence of concurrent jurisdiction between the State and Federal Courts, conflicts with the opinion from the United States Court of Appeals for the Eighth Circuit, *Williams v. Ragnone*, 147 F.3d 700 (8th Cir. 1998).

Petitioners (Defendants in the District Court) have a statutory right of removal. There was no defect in the removal procedure. However, Petitioners' right of removal has effectively been denied by the United States Court of Appeals for the Fifth Circuit. The United States Supreme Court has not previously spoken on the precise issue of whether the existence of concurrent jurisdiction in State and Federal Courts may serve as the sole basis for remand and therefore be used to defeat a defendant's statutory right to removal. This issue *res nova* to this Honorable Court, calls for examination of the Federal Court's original subject matter

jurisdiction, removal jurisdiction and a defendant's statutory right to removal, which present inconsistent decisions from the Circuit Courts of Appeal, and, SOI respectfully submits, should be resolved by this Honorable Court.

Federal Courts, as courts of limited jurisdiction, afford restricted and limited removal jurisdiction. Justice Stone, speaking for the Court in *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 61 S. Ct. 868, 85 L. Ed. 1214 (1941), stated:

> [n]ot only does the language of the Act of 1887 evidence the congressional purpose to restrict the jurisdiction of the federal courts on removal, but the policy of the successive Acts of Congress regulating the jurisdiction of federal courts is one calling for the strict construction of such legislation. . . .

Shamrock Oil & Gas Corp., 313 U.S. at 108-109.

A defendant's right to removal dates back to the original Judiciary Act of 1789.[26] The current removal statute, 28 U.S.C. § 1441, limits and restricts a defendant's ability to remove actions. When matters are clearly within the removal jurisdiction of a Federal Court, that statutory right should be protected and the removing defendant should be allowed the opportunity to proceed in a Federal forum. *See, e.g., Huber v. Greyhound Lines, Inc.*, 926 F. Supp. 821 (E.D. Wis. 1996); *Smith v. Anadrill, Inc.*, 762 F. Supp. 1267 (S.D. Tex. 1991); *Mercy Hospital Ass'n v. Miccio*, 604 F. Supp. 1177 (E.D.N.Y. 1985).

The OCSLA applies, controls and original subject matter jurisdiction exists by virtue thereof. SOI submits removal

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26. 1 Stat. 73, c. 20, § 12.

jurisdiction exists pursuant to 28 U.S.C. § 1441(b). The United States Court of Appeals for the Fifth Circuit, while finding that original subject matter jurisdiction exists, erroneously found that the matter did not arise under Federal law (previously addressed herein), and held that because of the existence of concurrent jurisdiction between State and Federal Courts, this matter was properly remanded.[27]

Although State Courts have concurrent jurisdiction, the law to be applied is exclusively Federal. 43 U.S.C. § 1333(a)(2)(A)[28]; *Rodrigue*, 395 U.S. at 357. The contractual disputes, while concerning a Texas law conceived contract, "arises under" Federal law pursuant to the OCSLA surrogate law mandate. As such, SOI has an absolute statutory right to removal under 28 U.S.C. § 1441(b). The District Court, in granting the Motion to Remand, deprived SOI of its statutory right to proceed in a Federal forum. SOI submits the District Court had neither the authority nor discretion to remand this properly removed claim. SOI recognizes parties may consent to litigate OCSLA matters in State Court. However, the United States Court of Appeals for the Fifth Circuit's reference to concurrent jurisdiction between the State and Federal Courts with respect to OCSLA claims as the proper and sole basis for remand is misplaced and affords neither a sufficient nor permissible basis to deprive SOI of its statutory right to proceed in a Federal forum.

It is well-settled that jurisdiction is concurrent between State and Federal Courts over personal injury and contract actions arising under the OCSLA. *E.g.*, *Gulf Offshore Co. v. Mobil Oil Co.*, 453 U.S. 473, 484, 101 S. Ct.

27. See Appendix A at 1a.

28. See Appendix G at 25a.

2870, 2878, 69 L. Ed. 2d 784 (1981); *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 232, 106 S. Ct. 2485, 2499, 91 L. Ed. 2d 174 (1986); *Laredo Offshore Constructors, Inc. v. Hunt Oil Co.*, 754 F.2d 1223, 1229 (5th Cir. 1985). The existence of concurrent jurisdiction does *not* grant the District Court the authority or discretion to remand based solely on such concurrent jurisdiction and to so grant is impermissible. *Williams v. Ragnone*, 147 F.3d 700, 702-703 (8th Cir. 1998). To do so effectively defeats a defendant's statutory right to removal.

The majority rule is clear. Absent contrary Congressional declaration, all civil actions brought under Federal statute over which Federal and State Courts have concurrent jurisdiction are removable. *See, e.g., Williams, supra*; *Warren v. United States*, 932 F.2d 582, 585 (6th Cir. 1991); *Emrich v. Touche Ross & Co.*, 846 F.2d 1190, 1196 (9th Cir. 1988); *Chilton v. Savannah Foods & Indus., Inc.*, 814 F.2d 620, 623 (11th Cir. 1987); *Baldwin v. Sears, Roebuck & Co.*, 667 F.2d 458, 460 (5th Cir. 1982); *Whitfield v. Federal Crop Ins. Corp.*, 557 F.2d 413, 414 (4th Cir. 1977); *McPhillips v. Blue Cross & Blue Shield of Alabama*, 79 F. Supp. 2d 1325, 1327 (M.D. Ala. 2000); *Weinstein v. Paul Revere Ins. Co.*, 15 F. Supp. 2d 552, 559 (D.N.J. 1998); *Stevo v. CSX Transp., Inc.*, 940 F. Supp. 1222, 1224 (N.D. Ill. 1996); *Huber, supra*; *Callison v. Charleston Area Medical Center, Inc.*, 909 F. Supp. 391, 394 (S.D.W.Va. 1995); *Yurcik v. Sheet Metal Workers' Int'l Assoc.*, 889 F. Supp. 706, 707 (S.D.N.Y. 1995); *Smith, supra*; *Mercy Hospital Ass'n., supra*; *McArthur v. Carmichael*, 1998 WL 146233 (S.D.N.Y. 1998); *Barrois v. Title*, 1996 WL 312063 (E.D. La. 1996).

In so ruling that concurrent jurisdiction permits remand to State Court, the United States Court of Appeals for the Fifth Circuit has clearly ruled in conflict with the United

States Court of Appeals for the Eighth Circuit in *Williams v. Ragnone*, *supra*. Furthermore, the United States Court of Appeals for the Fifth Circuit's Mandate arguably contradicts its own ruling in *Baldwin v. Sears, Roebuck & Co.*, *supra*, which, consistent with the majority rule, held that absent contrary Congressional declaration, all civil actions brought under Federal statute over which concurrent jurisdiction exists are clearly removable. *Baldwin*, 667 F.2d at 460.

When there exists a lack of subject matter jurisdiction, remand is clearly proper. 28 U.S.C. § 1447(c)[29]; *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 116 S. Ct. 1712, 135 L. Ed. 2d 1 (1996). Further, a case may be remanded for defect in the removal procedure, when warranted by Federal statute, when there exists a contract between the parties so directing, or when the Court has discretion to dismiss the action, such as when abstention is at issue.[30] *E.g.*, *McDermott Int'l, Inc. v. Lloyds Underwriters of London*, 944 F.2d 1199, 1204 (5th Cir. 1991), *reh'g denied*, 947 F.2d 1489 (5th Cir. 1991). Notably, however, the existence of concurrent jurisdiction between State and Federal Courts is *not* amongst those permissible reasons, cannot be used to defeat removal, and should not be the sole reason for remand. *See, e.g.*, *Williams*, *supra*; *Weinstein*, *supra*; *Huber*, *supra*; *McArthur*, *supra*.

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29. See Appendix F at 24a.

30. Abstention is appropriate when a Federal constitutional issue might be mooted or presented differently by a State Court, when there are difficult questions of State law bearing on policy problems of substantial public import of transcending importance, and, under certain circumstances, when federal jurisdiction has been invoked for purpose of restraining State criminal proceedings. *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 96 S. Ct. 1236, 47 L. Ed. 2d 483 (1976) (internal citations omitted).

The issue of whether the existence of concurrent jurisdiction between State and Federal Courts may be the sole reason for remand, when the matter was otherwise properly removed, is *res nova* with this Honorable Court. The United States Court of Appeals for the Fifth Circuit permitted remand based solely on concurrent jurisdiction between State and Federal Courts, effectively thwarting Petitioners' statutory right to removal and thereby the statutorily granted access to Federal Court. Such ruling effectively negates the removal statute, for a District Court could conceivably remand all properly removed cases based solely on the existence of concurrent jurisdiction between State and Federal Courts, an inherent circumstance in a proper removal setting.

CONCLUSION

The OCSLA expressly provides that the law of the adjacent State is to be applied as Federal law. Jurisprudence of this Honorable Court and a prior ruling of the United States Court of Appeals for the Fifth Circuit support the rule that a claim emanating from activities on the Outer Continental Shelf "arise under" the OCSLA. Therefore, for purposes of original subject matter jurisdiction and removal, Federal law governs.

The ruling and Mandate of the United States Court of Appeals for the Fifth Circuit conflict with controlling jurisprudence in erroneously holding that State law-based claims, which emanate from disputes occurring on the Outer Continental Shelf, do not "arise under" Federal law, while simultaneously ruling that original subject matter jurisdiction exists under the OCSLA.

Res nova to this Honorable Court is whether a civil action properly removed under original federal question subject matter jurisdiction may be remanded predicated solely on concurrent jurisdiction between State and Federal Courts. The United States Court of Appeals for the Fifth Circuit, in its ruling and Mandate, answered this question in the affirmative thereby sanctioning remand to State Court of such an action. Such ruling conflicts with a decision of the United States Court of Appeals for the Eighth Circuit and effectively denies a defendant's statutory right to remove the action and proceed in Federal Court.

Petitioners respectfully suggest the result of the United States Court of Appeals for the Fifth Circuit's ruling and thereby the affect on removal actions, warrants grant of this Petition for a Writ of Certiorari.

Upon review by Writ of Certiorari, the ruling and Mandate of the United States Court of Appeals for the Fifth Circuit should be affirmed, in part, as to the existence of original subject matter jurisdiction under the OCSLA, and reversed, in part, with instructions to vacate the District Court's Remand Order and to remand for consistent proceedings.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DATED AND FILED JULY 19, 2000

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 00-20582

In Re: STOLT COMEX SEAWAY HOLDINGS INC.;
STOLT COMEX SEAWAY INC.;
STOLT OFFSHORE INC.

Petitioners

Petition for Writ of Mandamus to the United States
District Court for the
Southern District of Texas, Houston

Before WIENER, EMILIO M. GARZA and PARKER, Circuit Judges.

BY THE COURT:

The district court entered an Order remanding this case to the 164th Judicial District Court for Harris County, Texas, reasoning that the burial of fiber optic communication cable on the Outer Continental Shelf was not a support activity of petroleum platforms and that the dispute at hand, which is a contract dispute involving the laying of said cable, does not involve the exploration, development or production of minerals of the Outer Continental Shelf and that therefore jurisdiction was lacking in the federal court. While we disagree with the district court and find that original

jurisdiction does, in fact, exist in the district court as a result of the subject matter of the contract in issue being a support activity of the petroleum platforms and aiding in the production of minerals of the Outer Continental Shelf, such jurisdiction is not exclusive in the federal courts, but is concurrent with the state courts. Further, we fail to see how this contract dispute "arises under" federal law. In other words, we have identified no element of plaintiff's cause of action, much less an essential element, that is created by a law of the United States, nor do we have a situation where Congress has so completely preempted breach of contract claims involving support activity of oil and gas production on the Outer Continental Shelf so that such claims would necessarily be federal in nature. *See Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 63-64 (1987); *see also Caterpillar, Inc. v. Williams*, 482 U.S. 386, 392-94, 398-99 (1987).

Our disagreement, however, with the district court involving its findings that the laying of this cable is not a support activity or involves the exploration, development or production of minerals on the Outer Continental Shelf does not alter the correctness of its conclusion that the state and federal courts have concurrent jurisdiction over contract issues brought under the OCSLA, and that no complete pre-exemption exists. The petition for mandamus is, therefore, DENIED.

APPENDIX B — MEMORANDUM AND ORDER OF REMAND OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION DATED JUNE 7, 2000 AND ENTERED JUNE 8, 2000

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-00-1271

SCIENCE APPLICATIONS INT'L CORPORATION,

Plaintiff

VS.

STOLT COMEX SEAWAY HOLDINGS, INC.,
STOLT COMEX SEAWAY, INC.,
AND STOLT OFFSHORE, INC.,

Defendants

MEMORANDUM AND ORDER OF REMAND

Pending before the Court in the above referenced action alleging breach of contract and negligent misrepresentation under Texas law, removed from the 164th Judicial District Court in Harris County, Texas by Defendants Stolt Comex Seaway Holdings, Inc., Stolt Comex Seaway, Inc., and Stolt Offshore, Inc. under U.S.C. § 1331 and § 1441(b) on the grounds that this case is preempted by the Outer Continental Shelf Lands Act ("OCSLA"), 43 U.S.C. §§ 1331, *et seq.*,

are the following motions: (1) Plaintiff Science Application International Corporation's motion to remand (#6); (2) Defendants' motion to extend submission day and for leave to conduct limited discovery (#10); and (3) Defendants' motion for expedited consideration (#12).

Plaintiff explains that this case arises out of a contract that it entered into with Petroleum Communications, Inc. ("PetroCom")[1] to lay approximately 500 miles of fiber optic cable on the floor of the Gulf of Mexico, in part on the Outer Continental Shelf ("OCS") off the shore of Texas, as a portion of a communications system known as "FiberWeb" connecting and designed to increase the speed of communication among offshore platforms and the Houston and New Orleans central business districts. Defendants, which provide underwater robotics, diving services and underwater engineering and construction to the offshore oil and gas industry, were selected to lay and bury the fiber-optic cable in the ocean floor but were unable to perform their contractual obligations within the time allowed.

The removing parties bear the burden of proving that removal was proper and that Plaintiff's claims arise under OCSLA. *Carpenter v. Wichita Falls Indep. School Dist.*, 44 F.3d 362, 365 (5th Cir. 1995). As here, where there is no diversity of citizenship among the parties, the propriety of

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1. According to a press release, dated September 5, 1997 submitted by Defendants as an exhibit to their opposition to the motion to remand, "PetroCom, a Louisiana corporation, is a leading provider of telecommunications services to the energy industries in the Gulf of Mexico with facilities in New Orleans, La.; Lafayette, La.; and Houston, Tx."

removal depends upon whether the case falls within original federal question jurisdiction under 38 U.S.C. § 1331. Under the well-pleaded complaint rule, a defendant may only remove a case to federal court where the complaint (or petition in Texas state court), standing by itself, establishes that the case "arises under" federal law within the meaning of § 1331. "A defendant may not remove on the basis of an anticipated federal defense, but instead must show that a federal right is 'an element, and an essential one, of the plaintiff's cause of action.' " *Carpenter*, 44 F.3d at 366, *quoting Gully v. First Nat'l Bank*, 299 U.S. 109, 111 (1936). If the plaintiff's complaint states only state-law causes of action, the case does not arise under federal law and many not be removed. *Kramer v. Smith Barney*, 80 F.3d 1080, 1082 (5th Cir. 1996). "Nor will an anticipated federal defense, including the defense of preemption, support removal."[2] *Id.* Only where the preemption is "complete" — where Congress has "so completely pre-empt[ed] a particular area that any civil complaint raising this select group of claims is necessarily federal in character" — may a petition asserting only state-law causes of action be removed. *Id.*, *citing Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 63-64 (1987). *See also Caterpillar, Inc. v. Williams*, 482 U.S. 386, 392-94, 398-99 (1987) (In the absence complete preemption,

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2. Generally federal preemption is a defensive matter that does not give rise to federal question jurisdiction in a nondiversity case, even in an action for a declaratory judgment that a state law is preempted. *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1 (1983). Only where the preemption is "complete," i.e., is so pervasive and displacing as to bring the case within the rule of *Metropolitan Life Insurance Co. v. Taylor*, 481 U.S. 58, is removal proper.

a plaintiff in a nondiversity suit is the master of his complaint and may avoid federal subject-matter jurisdiction by relying exclusively on state law.).

As a threshold matter, Defendants have requested an extension of time to respond and leave to conduct limited discovery on the issue of subject matter jurisdiction under OCSLA. Defendants provide a proposed set of interrogatories on the question and seek depositions of a corporate representative of Defendants and of PetroCom. They also move for expedited consideration of the motion to remand once the limited discovery is completed. In their opposition to the motion to remand, they make more specific arguments, to be discussed subsequently.

Plaintiff opposes an extension and leave to conduct limited discovery, arguing that such discovery is irrelevant because "to support removal, the defendant must locate the basis of federal jurisdiction in those allegations necessary to support the plaintiff's claim, ignoring his own pleadings and petition for removal." *Carpenter v. Wichita Falls Indep. School Dist.*, 44 F.3d 362, 365 (5th Cir. 1995) (remand motion should be based on petition alone). As will be discussed, if Plaintiff's allegations fall within the ambit of OCSLA's jurisdictional mandate, the state law claims will be preempted by what is termed OCSLA's surrogate federal law. Thus the Court addresses the arguments relating to the motion to remand before determining whether limited discovery should be permitted to aid in the determination.

Plaintiff moves for remand arguing that this Court lacks jurisdiction under OCSLA, 42 U.S.C. § 1349(b)(1), which

provides in relevant part, "The district courts of the United States shall have jurisdiction of cases and controversies arising out of, or in connection with (A) any operation conducted on the Outer Continental Shelf which involves exploration, development, or production of the minerals, of the subsoil and seabed of the outer Continental Shelf, or which involves rights to such minerals. . . ."[3] Plaintiff contends that Defendants' burial of the fibre cable did not involve "exploration," "development" or "production" of minerals of the OCS as those terms are defined by 43 U.S.C. § 1331 (k)-(m). Those terms refer to processes involved in the search for minerals, preparing to extract them by drilling wells and constructing platforms, *inter alia*, and removing the minerals and transferring them to shore."[4] *Tennessee Gas*

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3. OCSLA was enacted in 1953 to establish federal ownership and control over the mineral resources of the OCS and to provide for the development of those natural resources. *E.P. Operating Ltd. Partnership v. Placid Oil Co.*, 26 F.3d 563 (5th Cir. 1994). It also establishes a regulatory scheme controlling leasing and operations there. *Id.* at 566.

4. "Exploration" is defined as the "process of searching for minerals," including geophysical surveys and drilling." § 1331(k). "[D]evelopment means those activities which take place following the discovery of minerals in paying quantities, such as geophysical activity, drilling, platform construction, and operation of all onshore support facilities, and which are for the purpose of ultimately producing the minerals discovered." § 1331(l). " '[P]roduction' means those activities which take place after the successful completion of any means for the removal of minerals, including such removal, field operations, transfer of minerals to shore, operation monitoring, maintenance, and work-over drilling." § 1331(M).

(Cont'd)

Pipeline v. Houston Casualty Ins. Co., 87 F.3d 150, 154-55 (5th Cir. 1996). Clearly the burial of the cable did not relate directly to searching for, developing or extracting minerals from the OCS, Plaintiff argues.

Plaintiff asserts that OCSLA jurisdiction is generally limited to litigation directly relating to petroleum platforms or pipelines, essential instrumentalities for the exploration, development, and production of the OCS's resources. *Id.* at 154-55 (suit regarding damage to offshore platform covered by OCSLA); *EP Operating Ltd. Partnership v. Placid Oil Co.*, 26 F.3d 563, 568 (5th Cir. 1994) (dispute over ownership of offshore platform covered by OCSLA because resolution of the dispute "would affect the efficient exploitation of resources from the OCS and/or threaten the total recovery

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(Cont'd)

The Court notes that "operation" is not defined in the OCSLA. In *Amoco Prods. Co. v. Sea Robin Pipeline Co.*, 844 F.2d 1202, 1207 (5th Cir. 1988), the Fifth Circuit "generally" agreed that "operation" "refers to the doing of some physical act" and explained that otherwise the situs of the "operation . . . involv[ing] exploration, development, or production of minerals . . . of the [OCS]" would be uncertain making it extremely difficult to ascertain whether the "operation" had been conducted on the OCS," as required by § 1349 ("any operation conducted on the Outer Continental Shelf which involved exploration, development, or production of the minerals . . . ."). The Fifth Circuit further stated in *E.P. Operating Ltd. Partnership v. Placid Oil Co.*, 26 F.3d 563, 568 (5th Cir. 1994) that the terms "operation," "exploration," "development," and "production" "are defined broadly in the statutes to encompass the full range of oil and gas activity from locating mineral resources through the construction, operation, servicing and maintenance of facilities to produce those resources."

of federally-owned resources"); *Amoco Prods. Co. v. Sea Robin Pipeline Co.*, 844 F.2d 1202, 1210 (5th Cir. 1988) (OCSLA applied to dispute over "take-or-pay" provision in contract regarding purchase of natural gas from Gulf because the dispute might "alter[ ] the progress of production activities on the OCS [and consequently] threatens to impair the total recovery of federally-owned minerals from the reservoir or reservoirs underlying the OCS"); *Laredo Offshore Constructors, Inc. v. Hunt Oil Co.*, 754 F.2d 1223 (5th Cir. 1985) (OCSLA applied to breach of contract claim related to the construction of an offshore platform); *United Offshore Co. v. Southern Deepwater Pipeline Co.*, 899 F.2d 405 (5th Cir. 1990) (jurisdiction exists under OCSLA because contract dispute regarding the discharge of the operator of a gas pipeline connected to the OCS "would affect the exploitation of minerals" on the OCS).

In contrast, jurisdiction was found not to exist under the OCSLA in *Brooklyn Union Exploration Co. Inc. v. Tejas Power Corp.*, 930 F. Supp. 289, 292-93 (S.D. Tex. 1996), in which a seller of natural gas from the OCS claimed that it had been underpaid by a buyer of the gas because the dispute did not threaten to "alter the flow of production or otherwise affect the efficient exploitation of natural resources in the OCS." In *Harris Trust and Savings Bank v. Energy Assets Int'l Corp.*, 124 F.R.D. 115 (E.D. La. 1989), the court held a priority dispute between holders of a mortgage covering oil and gas leases on the OCS would not affect production on the OCS and therefore was not within the ambit of the OCSLA. The *Harris Trust* court distinguished the facts before it from those in *Sea Robin*, 844 F.2d 1202, by pointing out that the priority dispute did not have an "immediate

bearing on the production of" minerals or "threaten[ ] to impair the total recovery of the federally-owned minerals from the reservoir or reservoirs underlying the OCS." 124 F.R.D. at 119, quoting *Sea Robin*, 844 F.2d at 1210.

Plaintiff argues that the work of laying and burying the cable did not involve a search for minerals on, extracting minerals from, or removing minerals from the OCS and transferring them to shore. *Tennessee Gas*, 87 F.3d at 154-55. Instead, the fiber optic cable system was intended to speed communications between petroleum platforms in the Gulf of Mexico and the mainland of the United States. This dispute over a breach of contract or negligent misrepresentation of Defendants' abilities to bury the cable properly and timely does not threaten the exploitation of minerals in the OCS so as to confer jurisdiction under the OCSLA.

In opposition to the motion to remand, Defendants assert that the FiberWeb communications system is intended to serve as a data and/or communications link to oil and gas offshore producing platforms, and that the "installation of equipment [is] integral to" and directly affects the exploration, development or production of minerals from the subsoil and seabed of the OCS. Specifically they contend that "the defined purpose of FiberWeb is to provide broad band communications in the oil and gas industry offshore, based on several factors . . . including: the aggressive expansion of the energy industry into the deep waters of the Gulf of Mexico; the increasing amount of real-time data generated from seismic wireline and measurement during drilling activities; the more sophisticated oil and gas production and process control systems not being deployed

offshore and subsea; the trend to increase automation and reduce the number of workers assigned to the offshore production platforms; the need to connect offshore infrastructure to enterprise computing systems, which typically operate at higher speeds than legacy networks; the need to improve compliance with growing regulatory oversight by the MMS, EPA, OSHA, and other agencies; and the desire to improve the quality of life for offshore personnel by delivery of local cable and distance learning programs." Opposition to the Motion to Remand (#9) at 4-5. Defendants argue that the laying and burying of the cable is a "physical act" performed on the OCS under OCSLA. *Amoco Production Co. v. Sea Robin Pipeline Co.*, 844 F.2d 1202, 1207 (5th Cir. 1998); *Tennessee Gas Pipeline v. Houston Casualty Ins. Co.*, 87 F.3d 150, 154 (5th Cir. 1996). Moreover, under OCSLA, the definition of "development" includes "operation of all onshore support facilities," and the definition of "production" includes "operation monitoring" under 43 U.S.C. § 1331(l) and (m), both of which are design features of FiberWeb. They also claim that FiberWeb was expressly installed to connect nine Gulf Coast Oil platforms to land falls at Freeport, Texas and Fourchon, Louisiana and would allow offshore platforms to be monitored remotely from locations onshore. Opposition at 7-8. "Development" and "production" under OCSLA are broadly defined and to be broadly construed. *EP Operating Ltd. Partnership v. Placid Oil Co.*, 26 F.3d 563, 568 (5th Cir. 1994). Moreover, they point to the Fifth Circuit "but for" test for determining if a controversy falls under OCSLA, i.e., if the subject matter of the lawsuit would have occurred "but for" the subject operations on the OCS. *Tennessee Gas Pipeline*, 87 F.3d at 155; *Recar v. CNG Producing Co.*, 853

F.2d 367, 369 (5th Cir. 1988). They then argue that but for the operation on the OCS involving the development and/or production of natural resources, which consists of the laying and burial of fiberoptic cable, the dispute between the parties would not have occurred. Thus Defendants insist that the Court has jurisdiction over this suit under OCSLA. Furthermore they provide documents obtained from the home pages and/or websites of PetroCom and Defendants, an affidavit from Defendant Stolt Offshore Inc.'s Senior Project Manager Robert Murray about the cable burial project, and a couple of news articles to support their arguments about FiberWeb. Finally, they argue that removal is proper under *Hufnagel v. Omega Services Industries, Inc.*, 182 F.3d 340, 348-49 (5th Cir. 1999) because the claims here under Texas or Louisiana law are adopted as surrogate federal law by OCSLA, providing original federal jurisdiction. *See also Dennis v. Bud's Boat Rental, Inc.*, 987 F. Supp. 948, 951-52 (E.D. La. 1997); *Stokes v. Petroleum Helicopters*, No. Civ. A 97-0508, 1997 WL 695557 (E.D. La. 1997).

In a reply to Defendants, Plaintiff reiterates that to show removal was proper, Defendants must, but fail to, locate the basis of federal jurisdiction in Plaintiff's petition. *Carpenter*, 44 F.3d at 365. Nevertheless, Plaintiff argues that the petition and the documents relied upon by Defendant demonstrate that OCSLA does not apply to this case and that removal was improper.

Defendants broadly argue that burying cable relates to development or production of minerals in the OCS because the term "development" encompasses all onshore support facilities and "production" encompasses operation

monitoring, both design features of FiberWeb. Leaving aside the breadth of Defendants' definitions, Defendants emphasize that the burial of the cable did not involve operation of an onshore support facility or monitoring of a petroleum platform. They insist that the definition of "development" does not encompass the construction of a support facility tangentially related to the production of a platform. Nor did the burying of the cable involve monitoring of the removal of minerals, which would bring such activity within the definition of "production."

Furthermore, Plaintiff contends, the cases relied upon by Defendants do not support removal. In *Laredo Offshore*, 754 F.2d 1223, the Fifth Circuit held that a dispute over the construction of a stationary platform on the OCS involved "development" of minerals in the OCS because Congress specifically included "platform construction" in the definition of "development." 43 U.S.C. § 1331(l). In *EP Operating Ltd. Partnership*, 26 F.3d at 565, the Fifth Circuit reviewed a dispute over ownership of an oil pipeline, a natural gas pipeline, an offshore platform and related processing facilities. Plaintiff reasons that OCSLA jurisdiction over matters involving platforms and pipelines is explicitly provided for in the definition of "production," which includes "those activities which take place after the successful completion of any means for the removal of minerals, including such removal . . . [and] transfer of minerals to shore." 43 U.S.C. § 1331(m). In contrast the burial of fiber optic cable is not within the definition of "development" or "production."

Nor insists Plaintiff does the "but for" test of jurisdiction apply because in all three cited cases (*Hufnagel*, *Tennessee*

Gas, and *Recar*), the damage or injuries at issue occurred on petroleum platforms, which are explicitly cover by OCSLA and would not have occurred "but for" those platforms.

Finally, Plaintiff maintains, even if suits related to some support activities of petroleum platforms were covered by OCSLA, Defendants' burial of the cable was not a support activity. Only well beyond the facts alleged here could the cable potentially be involve in operation monitoring or other activities potentially related to the development or production of petroleum. No OCSLA cases support such tortured efforts to connect a dispute to the development or production of minerals in OCS. Rather, in the cases either the petition identifies OCSLA by name or it explicitly indicates that the dispute related directly to a platform or pipeline. Because the dispute at hand does not involve the exploration, development, or production of minerals of the OCS, federal jurisdiction is lacking and the Court should remand the case to the 164th Judicial District Court of Harris County, Texas.

This Court observes that state courts have concurrent jurisdiction over tort and contract issues brought under OCSLA, so federal courts do not have exclusive jurisdiction. *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 482-84 (1981).

A threshold issue here in reviewing Plaintiff's insistence that his well-pleaded complaint alleges only causes of action under state law is whether OCSLA completely preempts state law or whether, in this nondiversity case, if there is no complete preemption under OCSLA, Plaintiff as the master of his complaint is entitled to have this suit remanded to state court.

Appendix B

Preemption, which is rooted in the Supremacy Clause of the United States Constitution, Art. VI, cl. 2, may be express or implied and requires the Court to focus on Congressional intent. *Hetzel v. Bethlehem Steel Corp.*, 50 F.3d 360, 363 (5th Cir. 1995). If there is no explicit preemptive language in a statute, as is the case with OCSLA, Congress' intent to supersede state law may be inferred where "[t]he scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it," because "the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject," or because "the object sought to be obtained by federal law and the character of obligations imposed by it may reveal the same purpose." *Id.* Even if Congress does not completely displace state regulation in a specific area, it can nullify state law to the extent that the state law conflicts which federal law, and a conflict occurs when "compliance with both federal and state regulation is a physical impossibility, or when state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id.* In sum, there are three ways that state law can be preempted: (1) Congress explicitly states its intent that state law be preempted; (2) the very comprehensive federal scheme implies congressional intent to preempt state regulation in the area; and (3) state law either directly conflicts with the federal law or interferes with the regulatory program established by Congress. *Id.*

OCSLA has an unusual provision. Title 43 U.S.C. § 1333(2)(A) provides,

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> To the extent that they are applicable and not inconsistent with this subchapter or with other Federal laws and regulations . . . the civil and criminal laws of each adjacent State, now in effect and hereafter adopted . . . are declared to be the law of the United States for that portion of the subsoil and seabed of the outer Continental Shelf, ...

See also Rodrigue v. Aetna Casualty Surety Co., 395 U.S. 352, 356 (1969) (concluding that the language of OCSLA demonstrates that the law to be applied or the OCS is the federal law of the United States, and that state law is to be applied only as surrogate federal law and then only after federal law is applied and only when it is not inconsistent with the applicable federal law).

In *Hufnagel v. Omega Service Industries, Inc.*, 182 F.3d 340 (5th Cir. 1999), in which Hufnagel sued for personal injuries occurring on a fixed platform on the OCS in the course of his employment, the Fifth Circuit observed that OCSLA was enacted to provide a federal body of law to govern operations on the OCS and proclaimed that "OCSLA is exclusively federal law." *Id.* at 349. The Circuit pronounced that although OCSLA incorporates aspects of the laws of adjacent states where those laws are not inconsistent with OCSLA to fill in any gaps, this incorporated state law becomes "surrogate federal law" and is "considered exclusively federal law when applicable under OCSLA." *Id.*, *quoting* 43 U.S.C. § 1333(a)(2)(A), and *citing Rodrigue*, 89 S. Ct. at 1838 ("It is evident from this [legislative history] that federal law is 'exclusive' in its regulation of this area,

and that state law is adopted only as surrogate federal law."). In *Hufnagel*, the Fifth Circuit concluded that even though Hufnagel's petition did not plead OCSLA *eo nomine*, but sought imposition of strict liability for a ruinous structure under the Louisiana Civil Code, it did plead that the events occurred on a fixed platform on the OCS. It reasoned, "There is nothing which would make Kerr-McGee's platform or its conditions subject to Louisiana law other than OCSLA, which incorporates this Civil Code provision as "surrogate federal law." It further noted that "Hufnagel's employment furthered mineral production on the shelf," that his "injuries occurred on a stationary drilling platform involved in the 'exploration, development, or production of minerals on the shelf,' " and thus his claims fell within the jurisdictional grant of OCSLA. It therefore concluded that removal was proper.[5]

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5. The petition in *Hufnagel* also alleged unspecified violations of the Coast Guard and Secretary of the Interior Regulations having the force and effect of law where the accident occurred [i.e., the platform]." *Id.* The Fifth Circuit construed this reference to regulations as those issued under the authority of OCSLA, 43 U.S.C. § 1333(d)(1) ("The Secretary of the Department in which the Coast Guard is operating shall have authority to promulgate regulations . . . relating to the promotion of safety of life and property on the artificial islands, installations, and other devices referred to in subsection (a) . . . ." *Id.* Finally the Fifth Circuit noted that "Hufnagel has consistently acquiesced in . . . [the] characterization of his suit as including OCSLA claims." Thus the panel found the complaint asserted claims under OCSLA.

These facts are clearly distinguishable from those before this Court in the case *sub judice*.

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Hufnagel demonstrates that the mere pleading of state law causes of action will not prevent OCSLA from superseding where the claim falls within the ambit of OCSLA's jurisdictional mandate. *See also Stokes*, 1997 WL 695557, *2 ("Although the plaintiffs did not assert any OCSLA claims, the Act will nonetheless govern if the requirements of the statute are satisfied by their Complaints."), *citing Tennessee Gas*, 87 F.3d at 154-55.

Nevertheless, the Fifth Circuit, while describing the jurisdictional grant of OCSLA as "very broad," did not conclude that it was unlimited. *Tennessee Gas*, 87 F.3d at 154. The link between the disputed activity and an operation involving the exploration, development, or production of minerals of the OCS cannot be endlessly attenuated. The Court agrees with Plaintiff that the causes of action asserted here, i.e., a breach of contract for failure to perform burial of a fiber optic cable line and misrepresentations about their ability to perform this service, do not fall within the ambit of OCSLA because the dispute does not deal with or affect except in a most tangential way the operations involving the exploration, development, or production of natural resources of the OCS. Ultimately, once FiberWeb is in and operating, matters relating to the actual communications regarding production of minerals on the OCS may be within the jurisdictional grant of OCSLA. The Court concludes that the actual service of burying that cable, only part of which occurs in the OCS, by Defendants does not fall within that jurisdictional mandate. Nor have Defendants convinced this Court that additional discovery about the cable communications, as opposed to the act of laying and burying the cable, will be of any aid.

Appendix B

Accordingly, the Court

ORDERS that Defendants' motion to extend submission day and for leave to conduct limited discovery is DENIED. The Court further

ORDERS that Plaintiff's motion to remand this case to the 164th Judicial District Court of Harris County, Texas is GRANTED. Finally, Defendants' motion for expedited consideration is MOOT.

SIGNED at Houston, Texas, this 7th day of June, 2000.

s/ Melinda Harmon
MELINDA HARMON
UNITED STATES DISTRICT
JUDGE

APPENDIX C — PER CURIAM ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DENYING PETITION FOR RECONSIDERATION AND REHEARING DATED AND FILED AUGUST 18, 2000

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 00-20582

In Re: STOLT COMEX SEAWAY HOLDINGS INC.;
STOLT COMEX SEAWAY INC.;
STOLT OFFSHORE INC.

Petitioners

Petition for Writ of Mandamus to the United States District Court for the Southern District of Texas, Houston

ON PETITION FOR RECONSIDERATION AND REHEARING EN BANC

Before WIENER, EMILIO M. GARZA and PARKER, Circuit Judges.

PER CURIAM:

(✓) The Petition for Reconsideration is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on

Appendix C

Rehearing En Banc, (FED. R. APP. P. and 5TH CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

* * *

ENTERED FOR THE COURT:

s/ [illegible]
United States Circuit Judge

APPENDIX D — UNITED STATES CONSTITUTION, ARTICLE III, SECTION 2

ARTICLE III

* * *

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; — to all Cases affecting Ambassadors, other public Ministers and Consuls; — to all Cases of admiralty and maritime Jurisdiction; — to Controversies to which the United States shall be a Party; — to Controversies between two or more States; — between a State and Citizens of another State; — between Citizens of different States; — between Citizens of the same State claiming Lands under the Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

* * * *

APPENDIX E — 28 U.S.C. § 1441(b)

§ 1441. Actions removable generally

* * *

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

* * * *

APPENDIX F — 28 U.S.C. § 1447(c) and (d)

§ 1447. Procedure after removal generally

* * *

(c) A motion to remand the case on the basis of any defect in removal procedure must be made within 30 days after the filing of the notice of removal under section 1446(a) [28 USCS § 1446(a)]. If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal. A certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court. The State court may thereupon proceed with such case.

(d) An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise.

* * * *

APPENDIX G — 43 U.S.C. § 1333(a)(2)(A)

§ 1333. Laws and regulations governing lands

(a) Constitution and United States laws; laws of adjacent States; publication of projected State lines; international boundary disputes; restriction on State taxation and jurisdiction.

* * *

(2)(A) To the extent that they are applicable and not inconsistent with this Act or with other Federal laws and regulations of the Secretary now in effect or hereafter adopted, the civil and criminal laws of each adjacent State now in effect or hereafter adopted, amended, or repealed are hereby declared to be the law of the United States for that portion of the subsoil and seabed of the outer Continental Shelf, and artificial islands and fixed structures erected thereon, which would be within the area of the State if its boundaries were extended seaward to the outer margin of the outer Continental Shelf, and the President shall determine and publish in the Federal Register such projected lines extending seaward and defining each such area. All of such applicable laws shall be administered and enforced by the appropriate officers and courts of the United States. State taxation laws shall not apply to the outer Continental Shelf.

* * * *

APPENDIX H — 43 U.S.C. § 1349(b)(1)(A)

§ 1349. Citizens suits, jurisdiction and judicial review

* * *

(b) Jurisdiction and venue of actions. (1) Except as provided in subsection (c) of this section, the district courts of the United States shall have jurisdiction of cases and controversies arising out of, or in connection with (A) any operation conducted on the outer Continental Shelf which involves exploration, development, or production of the minerals, of the subsoil and seabed of the outer Continental Shelf, or which involves rights to such minerals, ...

* * * *